STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINA ZIETZ,

Plaintiff-Appellant,

v

AIU INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 16, 2006

No. 257522
Wayne Circuit Court
LC No. 03-314056-NF

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant in this no-fault insurance case. This case arises out of an insurance claim that plaintiff brought after she sustained injuries resulting from a motor vehicle accident that occurred when plaintiff was a passenger in a stolen vehicle. Because no material issue of fact exists regarding whether plaintiff knew that the vehicle she was in when the accident occurred was stolen, and because plaintiff's knowledge of the status of the vehicle was relevant, summary disposition was appropriate, and we affirm.

Plaintiff's first issue on appeal is that the trial court erred in only considering her answer to an interrogatory and not her deposition testimony regarding whether she knew that the truck she was in when the accident occurred was stolen. A motion for summary disposition under MCR 2.116(C)(10) is subject to de novo review. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion under MCR 2.116(C)(10), a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleading, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

During discovery in a related civil case, plaintiff answered affirmatively to the interrogatory question "were you aware that the 1999 Chevrolet Tahoe was stolen?" Plaintiff

also signed her answers to the interrogatories. At a subsequent deposition, however, plaintiff stated that she did not know that the vehicle was stolen and that the answer to the interrogatory was incorrect. The trial court held that plaintiff was bound by her answer to the interrogatory and refused to use her subsequent deposition testimony to find a genuine issue of material fact.

It is well settled that a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior deposition testimony. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). This Court has discussed the reasons for such a rule. "[W]hen a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence." *Dykes v William Beaumont Hospital*, 246 Mich App 471, 480; 633 NW2d 440 (2001), quoting *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991), quoting *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). Moreover, "[t]he purpose of GCR 1963, 117 (now part of MCR 2.116) is to allow the trial judge to determine whether a factual issue exists. This purpose is not well served by allowing parties to create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition." *Dykes, supra* at 480-481, quoting *Barlow, supra* at 250, quoting *Gamet, supra* at 726.

The rule has been extended to circumstances beyond deposition testimony contradicted by a later affidavit. This Court has accepted application of the "no-contradiction" rule to affidavits that contradict prior interrogatory answers. *Atkinson v City of Detroit*, 222 Mich App 7, 11-12; 564 NW2d 473 (1997). This Court has also rejected the use of an affidavit of meritorious claim filed by a health professional at the commencement of a medical malpractice case because subsequent deposition testimony contradicted it. *Dykes, supra* at 482. In *Dykes*, this Court noted that while the affidavit only restated the pleadings and articulated the threshold of proof, at the deposition, the health professional was subjected to cross-examination and responded to specific questions regarding the defendant's treatment of the plaintiff. *Id.*, at 481-482. This Court also noted that plaintiffs are required to file an affidavit of meritorious claim by a health professional at the commencement of an action. *Id.*, at 482. In its holding, this Court reasoned that the utility of summary disposition would be diminished if a party could defeat summary deposition be filing an affidavit, and rejected the use of the affidavit because, if it held otherwise, summary disposition would rarely, if ever, be granted in medical malpractice cases even if effective cross-examination negated an element of the plaintiff's prima facie case. *Id*.

While most of the cases cited above involved an affidavit contradicting a prior deposition, by analogy, logic requires that for purposes of summary disposition, any sworn statement made in a clear, intelligent, and unequivocal manner should be considered as conclusively binding in the absence of any explanation or modification, or of a showing of mistake or improvidence. Depositions are different from affidavits in that there is a chance for cross-examination, but that difference is not critical. *Dykes* discussed the value of depositions over affidavits, but it also focused on the purpose behind summary disposition motions. *Dykes, supra* at 481-482. Whether by a subsequent affidavit or a subsequent deposition, the purpose of summary disposition--to aid trial judges in determining whether a factual issue exists--would not be well served by allowing parties to create factual issues by merely asserting that their prior sworn statement was false.

In this case, plaintiff made a sworn statement in a clear, intelligent, and unequivocal manner when she answered that she knew that the vehicle was stolen. Contrary to her argument on appeal, her first chance to see her answer in typed form was not at her deposition. Rather, it was when she signed her answers to the interrogatories. While both plaintiff and her attorney allege a mistake occurred, plaintiff has not offered an explanation, nor shown mistake or improvidence. *Dykes, supra* at 480.

Also of import is that plaintiff pleaded nolo contendere to a charge of unlawful driving away of a motor vehicle, MCL 750.413 in relation to the theft of the vehicle involved in the accident. So even if we were to allow the deposition to diminish the admission in her interrogatory answer, plaintiff fails necessarily by her nolo contendere plea. In this case, plaintiff's plea is admissible pursuant to MRE 410(2) to interpose the insurer's defense. MRE 410(2); *Shuler v Michigan Physicians Mutual Liability Company*, 260 Mich App 492, 510-511; 679 NW2d 106 (2004) We conclude that plaintiff is bound by her statement that she knew the vehicle was stolen before she drove off in it.

Plaintiff also argues that, regardless of what she knew about the stolen vehicle, her claim is not barred because she never unlawfully took the vehicle, nor was she using it at the time of the accidence. MCL 500.3113(a) provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

Under that section, "coverage for personal protection benefits will be denied if (1) a person takes a vehicle unlawfully and (2) that person did not have a reasonable basis for believing that she could take and use the vehicle." *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 87; 596 NW2d 205 (1999).

Defendant would first have to show that plaintiff took the vehicle unlawfully. "The phrase 'taken unlawfully' is not defined in the no-fault act itself." *Mester, supra* at 87. It is the unlawful taking, not the unlawful nature of use that forms the basis for the exclusion under the statute, so the fact that a person does not possess a driver's license while using a vehicle is irrelevant. *Bronson Methodist Hospital v Michigan Mut Ins Co*, 198 Mich App 617, 627; 499 NW2d 423 (1993). An unlawful taking does not require intent to permanently deprive the owner of the vehicle to constitute an offense. *Mester, supra* at 88. The offense of unlawfully driving away a motor vehicle, MCL 750.413, commonly referred to as "joyriding," has been found to qualify as an unlawful taking in the past. *Id.*, at 88-89. In *Mester*, this Court reasoned that, had the legislature intended to exempt joyriding incidents from MCL 500.3113(a), it would have chosen a different term than "unlawful taking," such as "steal" or "permanently deprive." *Id.*, at 88. Instead, "the Legislature chose a term that encompasses the offense of joyriding." *Id*. This Court has recognized that MCL 500.3113(a) does not apply to cases where the person taking the vehicle unlawfully is a family member doing so without the intent to steal but, instead, doing so

for joyriding purposes. *Butterworth v Farm Bureau Insurance Co*, 225 Mich App 244, 249; 570 NW2d 304 (1997).

Based on her admission that she knew the vehicle was stolen, there is no genuine issue of material fact regarding whether plaintiff took the vehicle unlawfully. As discussed above, joyriding, MCL 750.413, constitutes an unlawful taking. The essential elements of joyriding are: "(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving away must be done without authority or permission." *Landon v Titan Ins Co*, 251 Mich App 633, 639; 651 NW2d 93 (2002). In this case, knowing that the vehicle was stolen and that she had no permission from the owner of the vehicle to take it, plaintiff took possession of the vehicle and drove it away with intent to take or drive the vehicle away, but not to steal it. She was not a family member of the owner of the truck and plaintiff pleaded no contest to a charge of unlawfully driving away a motor vehicle, MCL 750.413. Contrary to what plaintiff argues, the phrase "unlawfully taken" is not limited to theft. The phrase includes joyriding and, based on her knowledge of the vehicle's stolen status and her actions in driving the vehicle away, plaintiff unlawfully took the vehicle.

Plaintiff's knowledge is also relevant to whether she had a reasonable basis for believing that she could take and use the vehicle. A person need not receive the express permission of the owner of the vehicle in order to have a reasonable basis for believing that he can take and use a vehicle. In *Bronson*, this Court found that a driver had a reasonable basis for believing that he could take and use a vehicle where he was a passenger in the vehicle and the vehicle owner's son was in police custody and wished the vehicle taken home. *Bronson, supra* at 627. In this case, plaintiff had the permission of the truck thief to use the vehicle, but she also knew the truck was stolen. Based on that knowledge, there is no genuine issue of material fact regarding whether plaintiff had a reasonable basis for believing that she could take and use the vehicle.

Plaintiff also argues that her knowledge of the status of the truck is irrelevant because she was not using it at the time of the accident. Plaintiff was not driving at the time of the accident and MCL 500.3113(a) limits its exclusion to persons who are using a vehicle at the time of the accident. Contrary to plaintiff's argument, however, use is not limited to the driver. In *Mester*, an underage passenger was denied coverage on the basis of MCL 500.3113(a) because she was using a truck that she and her friends had unlawfully taken. *Mester, supra* at 89. We therefore conclude that plaintiff was using the vehicle at the time of the accident.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio